R. 10. 5. Syn. 7. 63. 314 l

A Briefe

DECLARATION

FOR

What manner of ſpeciall Nuſance concerning private dwelling Houſes, a man may have his remedy by Aſſiſe, or other Action as the Caſe requires.

Vnfolded in the Arguments, and opinions of foure famous Sages of the Common Law; together with the power, and extent of cuſtomes in Cities, Townes, and Corporations, concerning the ſame: together with the determination of the Law, concerning the commodity, and uſe of Houſes, and their appurtenances.

Whereunto is added,

The Iuſtices of Aſsiſe their opinion, concerning ſtatute Law for Pariſhes; and the power of Iuſtices of Peace, Churchwardens, and Conſtables: and to know what they are to do concerning Baſtards borne in their Pariſhes, reliefe of the Poore, and providing for poore children, what remedy for the ſame.

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The Arguments and opinions of foure famous Sages of the Common Law, touching the power, and extent of cuſtomes of Cities, Townes, Corporations, and Inheritances, together with the determination of the Law concerning the commodity, and uſe of Houſes with their appurtenances, and wherein an action may be maintaineable concerning the ſame, and wherein not.

A Man hath a Houſe, and the Windows thereof open into another mans houſe, whether hee may builde a houſe, ſo as to ſtop up the ſame lights, or not: concerning which, I purpoſe to ſhew you my opinion, and likewiſe to ſhew unto you the neceſſity and uſe of Houſes. Mr. *Mouſons* argument.

The firſt, and chiefe uſe of an houſe is to defend man from the extremity of the winde, and weather. And by the receit of comfortable light, and wholeſome aire, into the ſame to preſerve mans body in health.

Therefore whoſo taketh from man ſo great a commodity, as that which preſerveth mans health in his caſtle, or houſe, doth in a man-

manner as great wrong as if he deſeiſed him altogether of his Free-hold.

As if I have a Mill, and another will turne away the water running to the ſame, I may bring an Aſſiſe againſt him.

So, if I have a Pipe, which conveyeth water unto my houſe through the ground of another man, and he will cut my pipe, I ſhall have an action againſt him: In like manner who ſo ſtoppeth my light, is the cauſe that no ayre can enter into my houſe, without which no man can live, and a houſe lacking light, is rather a dungeon then a houſe.

If one who hath a horrible ſickneſſe be in my houſe, and will not depart, an action will lye againſt him, and yet he taketh not any ayre from me, but infecteth that which I have.

So if one caſt filth neere unto my houſe, I may bring my action againſt him. If a man build ſo high that his houſe droppeth on my houſe, I ſhall have remedy againſt him.

And though light and ayre be common, yet if by any mans owne act they may bee made private, they may not then bee taken from him, and if they be, hee ſhall not be without remedy.

This appeareth by Hawkes, and Deere, which be *feræ naturæ*, yet if by mans induſtry they are made tame, the owner will thereby gaine property in them: but peradventure it will bee ſaid, The ſoyle is his owne, and it is *Damnum*

abſq;

abſq; injuria, what then? though it be his owne, he muſt ſo uſe it, that hee hurt not his Neighbour.

As if a man had a Pond of water, and will ſuffer it to drowne his neighbours land, he ſhall have remedy againſt him.

If a man bee bound to repaire the bankes of the ſea that it drowne not the land adjoyning, and ſo doth not, but the land is drowned; an action lyeth againſt him. You may perhaps ſay there is plenty of light remayning, this notwithſtanding our action will lye very well, for the taking away, or impayring part thereof. As an action was brought *quare arctavit*, & 2. H. 4. where a man had a way and another plowed the ſame, and it was thought there that an action would very wel lye, and yet the way remained. If I have common in your Land, and you will plough part of the ſame Land, I ſhall very well maintaine an action againſt you. So it is of Common of Eſtovers, and piſcary: and yet in all theſe caſes, the whole is not gone, but ſome part remaineth. This proveth that though hee hath not ſtopped the whole light of the houſe, yet for that he hath ſtopped parcell, an action is very well maintainable, but if you had ſaid, that on the ſame ſide there had beene plenty of light, it might have better ſtood with reaſon.

As touching your cuſtome, whereby a man may ſtoppe his neighbours lights: I thinke this

is rather *malus uſus*, then any cuſtomē: for as I have learned of Mr. *Hales*, a cuſtome is thus defined, *Conſuetudo eſt jus non ſcriptum nunquam repugnans rationi naturali*, and therefore if any cuſtome ſwerve from reaſon, and naturall equity, it is but *malus uſus*, and for that to be aboliſhed, for by entendment, and conſideration of the law, and reaſon, every cuſtome had a reaſonable beginning, as that caſe in 35. H. 6. of ſelling Iewels in Cheapeſide may have a reaſonable beginning. In like manner the cuſtome of *Gavelkinde*, that Sons ſhall equally inherit the Lands of their Fathers. Such is the cuſtome, that if a woman marry without licence, that ſhe ſhall looſe her dowry.

So is it alſo of the cuſtome that one Towne may enter common with another. All theſe, and ſuch like may well bee thought to have a reaſonable beginning.

Otherwiſe it is, where by intendment their beginning cannot be thought reaſonable.

As that a man ſhall pay reliefe, when that he ſhall marry his daughter. And as the cuſtome is in Mich. 35. H. 6. fol. 31. of the pledging of goods: So it is of the cuſtome, to arreſt a man before the day of payment. In like ſort in 2. H. 4. that the tenant ſhall not put his beaſts into the Common, before the Lord hath put in his, which peradventure he will never doe, ſo it is 10. H. 6. If the Major of a Towne will preſcribe to impound all beaſts which ſhall be dammage

dammage feſonet in his owne pound, and there to keepe them till he be ſatisfied as he liſt, or if he preſcribe to uſe, and occupy the ſame beaſts howſoever he pleaſeth.

In 2. R. 3. and 22. E. 4. one demanded whether it were a good cuſtome, that if the Mayor of a towne ſuſpect a man, that he may arreſt and impriſon him 3. dayes: this was thought no good cuſtome, but to be moſt abhorring, and diſſonant from reaſon. And therefore forasmuch as houſes be neceſſary, and cannot bee without light and ayre, their beginning was lawfull, neceſſary, and reaſonable, but that a man might ſtoppe up his neighbours lights, was never neceſſary, neyther had lawfull, or reaſonable beginning, neither had any time obtained the force of a law, or cuſtome, for in K. *Hen.* the 2. his time, it was but a conſtitution in *London*, and not any cuſtome, and law, & therefore never allowed or confirmed in Parliament, for *Magna Charta Ca.* 9. did confirme ſuch old liberties and cuſtomes as *London* had at that time: And therefore, if this were not any law or cuſtome at the time of the making of that ſtatute, it neither was nor could be confirmed by the ſame, for the more generall Statutes ſhall have a reaſonable conſtruction. As the Statute that doth prohibite maintenance, ſhall have a conſtruction, for lawfull maintenance is not thereby prohibited. The like law is that where it is ſaid, that a fine ſhall bee a Barre to a *feme coverte*,

coverte; this is to be understood of a good, and lawfull fine, so this confirmation by Parliament of customes, and liberties of *London*, shall bee intended a confirmation of all their good, and lawfull customes, and not of unreasonable, or wrongfull usage, such as in 27. H. 6. if the house of tenant for terme of yeeres decay, that then he shall pay no rent, &c. But if your custome were then good, and so confirmed by Parliament, yet the words thereof may not be stretched to our case, the words are *visus fenestrarum*, and the Civill Law saith, a man may *estop visum*, & not *lumen*, *lumen est descendens de cœlo*, *visus est meus prospectus ad terram*.

And our Law saith, *petit visum terræ*, and *visus* and *lumen* differ. But Sir you cannot in this case defend your selfe both by the Common law and custome too. For you ought absolutely to trust to the one of them, and if you had plead thus by way of Bar, your plea without all doubt would have beene double.

As if a man will pleade affeafement with warrenty, and rely not on the warrenty, this plea is double. So in the case at the Barre, you plead both the common Law, and the custome, and your plea is double, and therefore for all these causes I thinke the plaintiffe ought to recover.

Mr. *Plowden*.

Mr. *Plowdens* argument.

Albeit it hath beene alledged, that the windowes

dowes have beene time out of memory there, and the lights ancient, it is all one, as if the houſe had beene built at this day. Put the caſe there is a pale betwixt your ground and mine, and you build to the uttermoſt part of mine, by your firſt building I am bridled and ſtopt of my building; And in the Country who ſo maketh a hedge, will make a dike in the uttermoſt part upon his owne land. So hee that maketh a Parke, will leave ground out of the ſame compaſſe without the pale for the Keeper to walke about it, for there he may better heare if any body bee there within, then if he were within himſelfe, And this is called free-bownd. If a man build his houſe ſo high that it droppeth on mine, an action will very well lye, for there is a manifeſt hurt, and wrong done unto me: but 22.H.6. where the *Prior* of St. *Edees* had three Mills, and other man built another by them, he could not have any remedy for this. But if any of his tenants which held of him by grinding at his Mill grinde at the new Mill, the *Prior* may have an action againſt him, for he whoſe the land is, might uſe the ſame for his greateſt commodity, and gaine.

If a man cut downe Trees which fall upon an other mans land, he ſhall have his action; otherwiſe it is, if a Tree full by reaſon of winde. So in our caſe: of our owne ſoyle we may make the beſt, as in 12.H.8. a man had apond, and let the ſame runne out, whereby the next dwellers

land was drowned, this was but *damnum absq; injuria*, wherefore no action would lie. In 4. E. 3 a man had a Lime-kilne, which destroyed the Fruit of his neighbour, who maintained his action, for in that case this taketh place, *Sic utere tuo, ut alienum non lædas*; And Mr. *Rastall* saith in his booke, if a man have a Dye-house, and the water which runneth to his house, killeth the Fish of another, an action lyeth. If a man cast filth under my walls, I may punish him for it. And in the 46. E. 3. The Prior of *Buckhurst* had a sluice, whereby Salmons came in, and one stopped the same, wherefore he had his action. Like whereas one cutteth away the water, which runneth to my mill, for the proofe where of Mr. *Raynolds* put a case out of 19. E. 3. where an Assise was brought for two things, one because he had levied a house to stoppe the light; an other, because he could not repaire the same: There it was thought that no action would lye, because he might have remedied this in the beginning when he built his house. And the case was in 7. *Edw.* 3. in the last point, and there the Lawyer sayd, that hee might have left space enough in his owne Land, and the party was non-suted. *Horwoods* report hath two verses,

Sæpe recordare si debes ædificare
Vt poteris stare cum eam vis reparare.

But you ayde your selfe with a prescription that

that you have had light time out of minde, this is no good preſcription, for a preſcription muſt be againſt ſome party. But this is againſt God; You ſay further, that the other had no houſe, which is not good, for a preſcription muſt be in the affirmative, and this is in the negative, and ſo ſayth *Priſot* in 22. H.6. that a man cannot preſcribe in the not having a houſe. But admitting it to be the uſage.

An uſage is generall, and a conſtitution ſpeciall in 12. E.4. A diverſity is taken betweene uſage, and cuſtome, for that a cuſtome is a thing diſagreeing from the Common law, but not contrary, and alſo it would not be beautifull that Cities ſhould have any voyd places in them, and it would be moſt honourable that they ſhould be populous. And therefore was there a Statute made 27. H.8. *ca. primo*, that there ſhould not be any voyd places in diverſe Cities, alſo houſes are neceſſary for the ſuſtenance of man, in 22. E.4. there is a cuſtome that if a man plough his Land, he might turne his plough upon an other mans land: and this was thought a good cuſtome for the favour of Tillage, much more our caſe of Building is to be favoured. 8. E.4. the cuſtome is, that a Fiſh-man may drive ſtakes into an other mans ground to dry his Nets, which was allowed for a very good cuſtome. Likewiſe 15. E.2. one preſcribed that when the Hay was carryed out of a certaine medow, that hee ſhould occupie the land untill our *Lady* day, which was allowed by the Court. So a man

may preſcribe to have Common of eſtovers in another mans land, and to cut them down himſelfe. The Lord in ancient demeſme preſcribed, that if the vallaine of another Lord remained a yeere and a day in ancient demeſme, that then it ſhall not be lawfull for his Lord to take him from thence. In like manner, one may preſcribe to have gravell in my Land, and all theſe cuſtomes ſtand very well with reaſon. If I have a way, and another man plow up the ſame, I cannot have an action on my caſe, but I muſt have a an Aſsiſe and ſo is the booke in 2. H. 4 M. *Fleetwood* ſaith that all cuſtomes muſt ſtand with reaſon. And in 5. E 4. it is ſayd, that albeit all cuſtomes are comfirmed, yet they muſt be examined, by the rule of reaſon, as the cuſtome of *Gavelkinde* ſtandeth with reaſon. The Statute that giveth a writ of raviſhment *de Gurd* to *Guarden* in ſoccage ſhall be extended to the Mayor, and Aldermen of *London*, to give them like remedy which was confirmed by 1 E. 3. Alſo the Statute that no man ſhall give lands in Mortmaine, yet Citizens and Freemen of *London* may give lands in Mortmaine by their cuſtom, which cuſtome is alſo confirmed by act of Parliament. As for the doubleneſſe of the plea I will not ſay any thing, for that it is not any Iuſtification, but onely for to diminiſh the damages, if perhaps it bee found againſt us. And therefore upon the whole matter, I thinke the plaintiffe ought not to recover in this action. I thinke the contrary, and firſt I will conſider theſe foure things.

Firſt,

First, whether ſuch buildings, *ex oppoſito*, be a nuſance by the Common law. Mr. Wrayes Argument.

Secondly, whether this cuſtome bee a good cuſtome.

Thirdly, whether ſuch kinde of buildings be for the beautifying of the City.

Fourthly, whether the ſaid confirmation by Parliament make this cuſtome good, or not.

As touching the firſt matter, the nuſance which is ſuppoſed to bee in ſtopping up of windowes in the South part of an houſe, I conceive is a nuſance by the Common law, for by the Common law, one ſhall not hurt the Freehold of another, and no greater hurt, grieveance, or dammage can bee done to any mans Freehold, than to take away the light and ayre thereof, which is comfortable, & commodious for him; for when this light, and ayre are taken from him, his houſe remaineth as a dungeon. And diverſe caſes there bee where a man taketh away from another not the thing it ſelfe, but the commodity of the thing, and for that he ſhall have his remedy by action: as if I have a water running through your ground unto my Mill, and you will turne away the courſe thereof, or ſtoppe the ſame; I may bring an aſſiſe 9. E. 3. *pla.* 19. yet I will confeſſe, that if an other build a Mill by my Mill, I may not have any action, as 22. H. 6. for it is *damnum abſque injuria*. So it is in 2. H. 4. in the caſe of the Schoole *eadem ratio*. But if any ought to grinde at my

Mill, and another will hinder them, an action lyeth, 9.H.6. *fo.* 45. where the Pryor of St. *Bartall* had a Faire, and one interrupted the commers thereto, whereby his Toll was impaired, and yet not his Faire, but the profit of his Fayre taken away, and he had remedy. So in our case he hath not medled with our Freehold, and yet hee hath hurt our Freehold. So in 4. E.2. 13. E.3. If I have a Faire, and the King will grant another, if my Fayre bee impared by this I shall have an action, and so of a Ferry, and the reason is, because a man is compellable to maintaine his Fayre, Ferry, or market, and if hee doe not, it is punishable in a Leete. But of a Schoole, otherwise it is, for that a man is not bound to maintaine it, but Houses and Cities men are bound to maintaine, and that by Statute, otherwise they may incurre the punishment. 18.E.3. one built his house so high over mine, that the raine dropped from his upon mine, and it was thought there that an action was maintainable, yet that hurt might have beene amended *à fortiori* in our case where the hurt is perpetuall, and cannot be amended. And if for a way an action lyeth, as it is in the 42. E.3 much more for an hurt to our health, which above all things men have regard unto, for the proofe whereof we have a writ in the Register *de leproso amovendo.* Likewise the selling of corrupt meate, whereby mens bodies may sustaine harme, is punishable in a Leete, which proveth

that

that thē Common law hath regard unto the health, and welfare of every private man. There is a caſe in 4. E. 3. *lib. aſſ. pla.* 3. where one built a Lime-kilne, and his neighbour was anoyed by the ſmoke thereof, and had his remedy. If a man ſhall be puniſhed for ſmoke, which may be avoyded, and dureth but at times, what ſhal wee thinke of the taking away of light, and ayre, which cannot be amended, but remaineth a continuall and perpetuall nuſance: as for the caſes in 19. *E.* 3. which hath bin avouched ſo oft to make ſtrongly againſt us, I take them to be one caſe, for ſo much as the Iuſtices which ſpeake in one place, ſpeake alſo in the other place, and laſt of all in both caſes, the caſe was thus, an aſſiſe of nuſance was brought, and the Plaintiffe counted how the Defendant had levied a houſe, ſo that thereby his light was ſtopped up, and that he could not ſo well come to his houſe as he did before, alſo that he could not repaire his houſe ſo well as he could before.

Herebe ſaid, as to the light be it a nuſance, ſuch a one as it is *Tiel. quel.* for the repairing none, for when a man buildeth, hee muſt leave ſo much ſpace on his owne ground that hee may come to repaire his houſe, and if he had thought that ſtopping of his light had bin no nuſance he wold not have ſaid, be it a nuſance *Tiel. quel.* but have ſaid as he did to the other caſe of repayring, it is no nuſance. And therefore for the firſt matter, I thinke this to bē a nuſance by the Cōmon law.

As

As touching the ſecond matter, whether this cuſtome be a good cuſtome or not, and I thinke the ſame is no good cuſtome: For *conſuetudo eſt in. &c. ut ſupra*, a cuſtome is not againſt law, and reaſon, but this cuſtome of yours is againſt reaſon, and is in effect, as if a man ſhould take my life from me, for theſe bee the inſtruments to maintaine, and preſerve mans life, and the law ſaith, *ſic utere tuo, ut alienum non lædas*, therefore a cuſtome againſt this precept, is *malus uſus*, and therefore *abolendus*, as the caſe in 21. E. 4. If the Kings Bayliffe or any other Bayliffe diſtraine Cattell, and bring them to the Lords Pound, and if the owner did not within three dayes agree with the Lord, that then he ſhould looſe his Cattell, this was thought unreaſonable and not allowed for any good cuſtome. So in 9. *H.* 6. where there the Lord of a Leet would have preſcribed to have all the waſte ground, but he could not, becauſe it was againſt reaſon, that he who had nothing in the land ſhould have the waſts. Like unto the ſaid caſe in the 35. *H.* 6 *fo.* 31. of pledging of goods, and ſuch is that caſe in 43. *E.* 3. where the Lord of the Māner would have preſcribed, that none of his tenants ſhould marry their daughters without his licence; this cuſtome was thought to bee againſt all equity, and reaſon. In 13. *E.* 3. in a *dum fuit infra ætatem*, one would have preſcribed, that if the Plaintiffe could number 12*d.* he might *alien* his land by the cuſtome: this is not a reaſonable cuſtome, for

for a man may bē able to number 12*d.* and yet not have diſcretion enough to alien his Land. So it is likewiſe againſt naturall reaſon, that one ſhould barre me of my light, and ayre, without wh ch I cannot live, and therefore theſe things be of neceſſity. Alſo it is againſt the Law that one ſhould meddle with the Freehold of another man, unleſſe it be for a Common-wealth, as 8. E.4. where one juſtified the ſetting in of ſtakes for to dry his nets, and likewiſe in the 11.H.2. where one brought an action for taking or driving his Hogges, the Defendant juſtified, becauſe the cuſtome of the City was, that if any mans Hogges came into the City, and upon warning given to the owners to keepe them out; if they came againe, that then they ſhall be forfeited. This is a reaſonable cuſtome, becauſe Swine are beaſts that may cauſe diſeaſes to bee in a City, and therefore it is againſt the Common-wealth, in 22.E.4. Where it is ſayd, that a man may turne his plow upon another mans land, that is a good cuſtome, for by this meanes no land ſhall be unſowne, which is for the maintenance of Tillage, and the benefit of the Common wealth. But this your cuſtome is but a private cuſtome, and not for the maintenance of the Common-wealth, and therefore is like unto the cuſtome in 43.E.3. that if the tenant ceaſe to doe his cuſtome, the Lord may enter, this cuſtome ſtandeth not with the Common law, neither with the Statute which put-

teth the Lord to his *ceſſavit*, and giveth him not any entry. So it is to be thought of the cuſtome in 2.H. 4. that the Tenants ſhall not put their beaſts into the Common before the Lord hath put in his, which peradventure he will never do, ſo that the Tenants ſhall never have their Common. So it is if a man preſcribe that the alienation of the Husband of the Lands of his Wife ſhall bee good without examination of her. Like law of the cuſtome in 43. E. 3. that if any goods be wayned in any manner, and if any man take them, that then it ſhall bee lawfull for mee to diſtraine, and detaine thē diſtreſſe untill ſuch time as I am ſatisfied: by theſe caſes rehearſed it is manifeſt and cleare, that all uſages again ſt naturall reaſon, and the Common law of this Realme, are not cuſtomes, but evill uſages, and not to be allowed. So in our caſe a cuſtome to take away a mans light, and ayre, preſervers of health, muſt needs bee *malus uſus*, and therefore ought to bee taken away; For good uſages ſtand with reaſon, and as *Bracton* ſaith, muſt give place to reaſon and law. But you will ſay, that the law of your City is ſuch: I ſay if it ſtand not with reaſon and law, it ſhall not bee allowed. As 10. E. 3. in an appeale brought by a Cittizen, the Defendant waged battaile, this Cittizen ſaid the cuſtome of *London* is ſuch, that a ſtranger ſhould not wage battaile againſt a Citizen, this was thought no good cuſtome, nor ſufficient to deprive a man

of a benefit, which the law giveth him. And ſo in 27. H. 6. in an act on of debt upon a leaſe for yeeres, the defendant ſayd that the cuſtome was, that the plaintiffe ſhould repayre the houſes, and if not, that the defendant ſhould pay no rent, this was thought to bee no cuſtome allowable. For the third point, this is no beautifying at all to the City. In our caſe Mr. *Hayles* his houſe is an ancient houſe, and therefore againſt reaſon that by later building, the commodity, and uſe of the ſame ſhould bee taken away. You ſay alſo that it is a thing honourable to have buildings in Cities; This I grant, and I thinke no man will deny it: but by building of one, to impaire a better houſe, this is not any beautifying, or honour at all to a City, but rather the contrary. For the fourth matter, if the cuſtome be not good, the confirmation cannot make it good: for as I take the law, the common learning is, that a confirmation cannot make a voyd thing good: as for a confirmation *eſt firmum facere id quod non firmum fuit ante, ſed fuit tamen*, 26. H. 8. If an Infant grant an advouſon, and at his full age confirmeth the ſame, by this confirmation nothing is wrought. So it is in the caſe of 33. E. 3. where the leaſe for yeares was made by a Biſhop, and he dyed before the yeeres expired, the ſucceſſour confirmeth the ſaid leaſe, and *nihil operatur*. Likewiſe in 39. H. 6. the King granted an advouſon to one, and after granted the Mannor with the advouſon to

another and after the confirmation is made, yet the advouſon paſſeth not. But where the Statute limitteth that men may deviſe unto corporations in Mortemaine, yet if they will deviſe to any that is not a Corporation, it is without warrant: And alſo albeit a man may not wage his law in *London*, yet if at the Common law, an action be brought againſt him, hee may: So it is of the caſe in 20. H. 6. that if one be brought before the Sheriffe, that the Mayor may diſmiſſe him, yet after judgement hee may not diſmiſſe him.

Likewiſe 12. E. 4. where one would have preſcribed to buy things without paying of tolle, that he could not be allowed. And therefore I will conclude that ſuch cuſtomes as ſtand with law, and reaſon, are to be allowed, and contrary ſuch as ſwerve from the rules of law, and reaſon, to be diſallowed. As this cuſtome of yours, that a man ſhould ſtop his neighbours lights is altogether unlawfull, and unreaſonable, and therefore the plaintiffe ought not thereby to be barred of his action.

Mr. *Manwood*.

Mr. Manwoods Argument. Here bee two matters chiefly to bee conſidered, whether by the Common law this bee a nuſance, to ſtop up part of a mans light, then if the Common law ſeeme to be doubtfull, whether the cuſtome will helpe us, or not, divers caſes

caſes have beene put, when a man toucheth not the Free-hold of another, but on his owne land doth wrong unto another mans. But all theſe caſes doe vary from our caſe, for they are where a man hath a private profit in a thing, and another by doing an act upon his owne land taketh away the ſame, wherefore an action will lie, as the caſe in 46. *Edw.* 3. where the Abbot of *Buckhurſt* had Salmons, comming in at a ſluice from the Sea, and a ſtranger ſtopped the ſame, ſo that they could not come, and hee had his action. So it is where one taketh away my way, becauſe this is a thing locall. And ſo if water running to my Mill, if one miſcarry the ſame: generally whereſoever I have a private profit, or interreſt, and one barre me of the ſame, it is injury: but the ayre is not any element locall, neyther may any man miſcarry it, for it ſuffereth nothing to be voyd, alſo light, and ayre bee not thirgs of neceſſity, but of pleaſure, and bee not any profit in *certo loco*, and therefore not like unto other caſes of things both profitable, and alſo neceſſary. The caſe of the Ferry I will grant, that if I have a Ferry to tranſport men, and another will erect another I ſhall have an action, becauſe that I am compellable to maintaine it, and the not keeping of it, is preſentable in a Leete. The ſame law is of the Market, where the King granteth another Market *ad nocumentum* of mine, I may have a *Scire facias* to repeale his letters patents if he have theſe words

in them, that the grant ſhould not bee to the hurt, or prejudice of any other market; and if not, I ſhall have an action on my caſe: your caſe was alſo compared to the caſe in 4. E. 3. and 4. *aſſ. pla.* 3. where the *aſſ.* was maintained, not for that the plaintiffe was annoyed by the ſmell of the ſmoke, but becauſe his Apple-trees, and other his fruits were deſtroied by the ſame, & this is a good reaſon, for that it is to his diſinheritance. As for the caſe of the Lime-houſe at *Ratcliffe*, and the ſmoke of Smiths houſes which caſt many unſavory ſmels, it is *damnum abſq; injuria.* And I my ſelfe was by a Smith annoyed by the ſmell of his ſmoke, but yet might I not have any action againſt him. In 18. *Edw.* 3. one built an houſe ſo high that it dropped from his to mine, in this caſe an action will lye, for my tyles are thereby conſumed, *gutta cavat lapidem.* So of the caſe in 2. H. 5. if by common aſſent our houſes joyne and a gutter is made betwixt us, if I plucke up my part, you may maintaine an action againſt mee. All theſe caſes hitherto put, have beene of taking away a locall commodity, or elſe of conſuming ſomething.

The caſe of the filth I finde not in my booke, but in the booke of Entries, and there it was *Per parietes*, ſo that the wals were hurt thereby. But I will agree with you, that if all your windowes were ſtopped, that an action will lie, and where you ſay, *ſic utere tuo ut alienum non lædas*, this

this is not meant of things of pleaſure, but of things of profit. And here is not any part of your houſe conſumed, but herein a let of your pleaſure onely, for which your action is not maintainable. And if I have a Windmill, and another will build another by mine. I cannot have any action againſt him. 11.H. 4. 7.E.3. 22.H.6. But otherwiſe it is of a Watermilne, *9.aſſiſar.pla.19.* where one had a Watermill, and another built neere unto him, ſo that hee could not grinde ſo much as he was wont, in this caſe a man may very well maintaine his action. If I have an Inne, and another ſet another in the ſame Towne, hee is not puniſhable, but if hee will ſtop my gueſſe, which come to my houſe, I ſhall have remedy. If I have a Brew-houſe, and another build another by mine, I ſhall have no action. 12. H.8. If water fall on my land, and I make a Sluice, and let it out of my land unto another mans; this is diſpuniſhable, for every man may doe this one after another untill it come unto the River, but if it be a river, otherwiſe it is; For there it is in *loco certo*. If one houſe ſhould not bee adjoyning unto another, it would bee a great deformity, and if *Cheapſide* were ſo built, it would be a ſtrange *Cheapſide*. And the Civill lawes ſay, that two lights on the former part, and backe of an houſe, are ſufficient. And if you make your windowes into our garden, this is a wrong done unto us, for by this meanes I cannot talke with my friends

in

in my Garden but your ſervant may ſee what I doe, and ſo the wrong firſt begun in Mr. *Hales*. And therefore *Vim vi repellere licet*. And *I.S.* hath not conſumed, or hurt any part of his houſe, but interrupted him of his pleaſure only. But I further affirme, that for every hurt a man may not have an action, but if a man bee oftentimes hurt, he may very well have an action. As if the Lord diſtraineth for rent, an action lyeth not, but if he diſtraine ſo oft, that I cannot plow my land, I ſhall have an aſſiſe. So the Kings grant of exemption to one is good, but if it be to diverſe, it is not good. But if the Common law would not helpe us, yet cuſtome will, & whereas it hath beene ſayd, that it is againſt naturall reaſon, and law, it is not ſo, *Conſuetudo ex rationabili cauſa privat communem legem*, and unleſſe it do *privare communem legem*, it is no cuſtome. As that an Infant of 15 yeares age, may alien. For at this age he may conſent to marriage, therefore in as great reaſon may he alien his lands; & in ſome places any Infant of 9 yeares may binde himſelfe apprentize, which is a good cuſtome and ſtandeth with reaſon. But ſome cuſtomes there are that be not good. As that the tennants ſhall not drive their beaſts into the Common before the Lord hath put in his. So if the leſſee will preſcribe to ſurrender at his will, 7.H.6. otherwiſe it is of the cuſtome in the 14. H.4. that the Tennant ſhall not alien without the preſentment of the ſame before, this is a good

cuſtome

cuſtome, and yet againſt common reaſon, but yet if it hath any taſte or ſmatch of reaſon, it ſhall be allowed. As if the Lord preſcribe that the tenant ſhall not common with any beaſts, but thoſe which were bred on the ſame land. this is good, for this will cauſe the tennant to breed Cattell; likewiſe that a *feme ſole Merchante* ſhall ſue without her husband, this is good, and yet againſt Common law, and reaſon, becauſe the husband hereby is diſcharged of all ſuch buſineſſe: therefore if a cuſtome have any part of reaſon, it ſhall be allowed. As 8. E. 3. that a man may make an eſtate to his wife during her life, and that ſhould bee as good as an endowment *ad oſtium eccleſia*. So it is of the cuſtome of the Iſle of man, that to ſteale a Capon, or a Pigge, ſhall bee Felony, and not to ſteale a Horſe, or Cow, for that the one may bee hid, the other may not. Likewiſe is it, that the youngeſt ſonne ſhall inherit, becauſe he is leſſe able to helpe himſelfe. So is it of the cuſtome of *Kent*, The Father to the bough, the ſonne to the plow, and yet directly againſt the Common law. So I thinke of the caſe of Hogs put by Mr. *Wray*, for that in the time of peſtilence it is dangerous to let them come into Cities.

This City is the greateſt City, and moſt populous in this Realme, and the more populous the more honourable, & the more buildings, the more populous and honourable will it be. And

therefore Buildings is to be favoured. And by this building all his light is not ſtopped, but parcell. And Mr. *Hales* thereby looſeth no not any great commodity, but is reſtrained of a little pleaſure, for which he cannot maintaine his action.

To the act of Parliament I will ſpeake nothing, but this I will ſay, that if any cuſtome be meerely voyd of reaſon, it is not good. As the cuſtome in 5. H. 7. that if the Lord diſtraine the beaſts of his tenants for rent, that hee may detaine them untill hee bee ſatisfied at his pleaſure; and 21. H. 7. that if any doe breake the Pound he ſhall pay 3 l this is a voyd, and unreaſonable cuſtome to binde an eſtranger, and yet by common conſent of the Lord, and tennants, it is good to binde the tennants.

So if I preſcribe, that if any mans Sheepe goe on my ground all the day, to have the foldage of them in the night, is a good cuſtome, becauſe by common entendment the owner hath *quid pro quo*. So our cuſtome is for the maintenance of the City, neither is it againſt the common law directly, neither hereby any offence, or hurt is done unto Mr. *Hales*, for his houſe is not thereby impayred. And therefore, I thinke his action will not lye.

Finis de ceux Arguments.

RESO-

Reſolutions of the *Iudges of Aſſiſes*, 1633.

1. *Queſtion.*

WHether the Church-wardens and Over-ſeers of the poore of a pariſh with aſſent of two Iuſtices of the Peace, one beeing of the Quorum, may by the Statute of 43. *Elizabeth*, *cap.* 2 or any law enforce a Pariſhioner of the ſame Pariſh to take a child of a poore pariſhioner of the ſame Pariſh, who is not able to keepe his ſayd childe, to bee an apprentiſe?

Reſol. The Statute of 43. of *Elizabeth*, which ſayth, that the Church-wardens and Over-ſeers of the pariſh ſhall put out Children to bee apprentices, neceſſarily implyeth, that ſuch as are fit muſt receive Apprentices, and the putting out of poore children to bee apprentices is one

of the beſt wayes for the providing for the poore.

2. Q. If they may, then whether they muſt not give money with him, and who ſhall determine what money ſhall be given with him, if the party that is to take ſuch an apprentice, and the Church-wardens, and Overſeers cannot agree thereupon?

Reſol. There is no neceſſity that money muſt bee given, but that muſt bee left to the diſcretion of the Church-wardens, and Overſeers, all circumſtances of age and ability, being conſidered, and if they cannot agree with the party, then the Iuſtices of Peace neere adjoyning, or in their default the Seſſions of peace are to determine theſe Controverſies.

3. Q. Whether a Knight, Gentleman, Clergy-man, or Yeoman, or one that is Sojourner, uſing husbandry, cloathing, or graſing, or the like, may be enforced to take ſuch an apprentice?

Reſol. Every man who is by calling or profeſſion or manner of living, that entertaineth, and muſt have the uſe of other ſervants of the like quality, muſt entertaine ſuch apprentices, wherein diſcretion muſt be given upon due conſideration of circumſtances.

4. Q. Whether a wealthy man keeping few or no ſervants, nor wanting a ſervant, but living

ving privately may bee enforced to take such an apprentice; if not, then whether he may be taxed towards the putting forth of such an apprentice?

Resol. For the receiving of such apprentices, the answer may bee referred to the question next before; but out of doubt every such person must contribute to the charge, as to other charges for the provision for the poore.

5. Q. Whether they may enforce a parishioner that is of one parish, to take such a child, apprentice, that is of another parish, but within the same County or division, if the proper parish be not able to provide for the children of the same parish?

Resol. The Iustices may provide Masters for them in other parishes within the same hundred; if the same hundred be not able, then out of that hundred in the rest of that County; As for other provision for the poore, which must bee at a quarter Sessions.

6. Q. If such a Parishioner may be enforced to take such an apprentice, and shall refuse not onely to take such an apprentice, but also refuse to be bound to appeare at the next quarter Sessions, or Assizes, what shall be done to him?

Resol. If any refuse; let such a one be bound over to the next Sessions or Assizes; if hee refuse to give such bond, let him bee sent to

the *Gaole*, there to remaine untill hee will give such bond.

7. Q. If such a Parishioner who refuseth to take such an apprentice shall bee bound over to the Sessions for not taking such an apprentice, and when he appeareth there, shall likewise refuse, what shall be done to him, and what shall bee done to the Parents who refuse to suffer their Children to be put out to bee apprentices, themselves not being able to maintaine them?

Resol. If at the Sessions or Assizes such a one refuseth to take an apprentice, and his excuse be not allowed, it is fit he bee bound to the good behaviour, and it will be a good course to indict such a refuser for a contempt, and thereupon to fine and imprison him, if he refuse to be bound to the good behaviour, let him bee imprisoned untill hee will; and the Kings booke of orders directs that such be bound with good surties to appeare at the Councell board; and if the Parents of such poore children refuse to suffer their children to be bound apprentices, or being bound, entice them away, themselves not being able to maintaine them, let them be committed to the house of correction.

8. Q. Whether it bee in the power of any generall quarter Sessions to mittigate any penalty upon a Statute law; if the party indicted shall submit himselfe to the fine of the Court, and wave the traverse?

Resol.

Resol. If the party bee convicted or confesse the fault, it is not in the power of the Court to mittigate the fine, in such cases where the Statute makes it certaine: but if the party indicted protesting his Innocency, yet *quia noluit plitare cum domino Rege* puts himselfe up into the grace of the Court, the Court may impose a moderate fine, and order to forbeare the prosecution.

9. Qu. If any be bound to appeare at the Sessions, and shall tender submission to the Court, whether the Sessions may stae the indictment, and mitigate the fine, aforesayd upon the confession of the fact?

Resol. This is answered before to the next precedent Article.

10. Q. If a man be convicted for being drunk, tipling, and keeping an unlicensed Alehouse, or being licensed, for suffering others to remaine tipling in his house, or for swearing or driving Cattell upon a Sunday contrary to the Statute in that case provided; whether the Iustice of Peace, before whom hee was convicted, or any other Iustice of the Peace may discharge him of all or part of the Forfeiture or punishment appointed by the Statute?

Resol. The Iustices have no such power of mitigation after conviction, where the Statute appoynts the measure of the punishment.

11. Q.

11. Qu. Whether a Conſtable may upon a Warrant for carrying one to the houſe of correction for keeping an unlicenced Alehouſe upon the ſecond conviction breake open the houſe wherein the party convicted is, to apprehend him?

Reſol. This queſtion is to bee adviſed upon, it is put in generall termes and referred to bee conſidered in the particular where it appeareth.

12. Qu. If a woman unmarried be hired from weeke to weeke, or from halfe yeare to halfe yeare, in one Pariſh, and there be gotten with child, and then goeth from thence unto another pariſh, where ſhe is ſetled in ſervice by the ſpace of two or three months, and then diſcovered that ſhe is with childe: The queſtion is, whether ſhe ſhall bee ſetled in the Pariſh where ſhe was begotten with child, or in the Pariſh where ſhee was laſt ſetled?

Reſol. The place where ſuch a woman was lawfully ſetled, is the direction in this caſe, not where ſhe was begotten with child.

13. Qu. If a woman ſervant unmarried bee begotten with child, and then goeth out of her Miſtris ſervice, before or after it is diſcovered that ſhe is with child, and the reputed father bee runne away, or is not able to free the Pariſh: whether the Maſter may bee enforced to provide for her till ſhee bee delivered, and for a moneth after?

Reſol.

Reſol. If the Maſter hath legally diſcharged his houſe of ſuch a ſervant, hee is no more bound to provide for her than any other.

14. Qu. In caſe a Pariſh conſiſt part of ancient *Demeaſne*, and part of *Guildable*, an Aſſize is made for the reliefe of the maimed Souldiers, the Gaole, &c, according to the Statute of 24. *Elizabeth, cap.* 2. whether the tennants in ancient demeſne ſhall contribute with the Guildable for the payment of the Aſſize?

Reſol. The Statute doth not diſtinguiſh betweene the ancient Demeaſne and the Guildable in theſe caſes, *ubi lex non diſtinguitur, ibi nec nos diſtinguimus.*

15. Q. Whether an Indictment of forceable detainer bee within the Statute of 1. *Iacobi, cap.* 5. and not to bee removed by *Certiorari*, unleſſe the party Indicted firſt finde ſureties according to that Statute, and whether the party Indicted bee to be bound in his abſence to proſecute according to that Statute, and whether an Indictment of forcible entry &c. found at a private Seſsions bee to bee removed by *Certiorari* without ſureties, according to that Statute?

Reſol. This is fitteſt to be left unto the Court of Kings-bench, to whoſe Commiſsion, and juriſdiction this is moſt proper.

16. Q. If one bee convicted upon the Statute of 3. *Car. R. cap.* 13. for driving of Cattell

on the Sunday through ſeverall pariſhes; whether hee ſhall forfeit 20.s. to every of the ſayd pariſhes; or onely to one; if to one, then to which of them?

Reſol. This Statute giveth the Forfeiture but of one 20.s. for one Sabbath day. Although the driving of that day bee through divers pariſhes. Therefore where the action is firſt attached, and the diſtreſſe firſt taken, that pariſh ſhall have the benefit of the Forfeiture, and not the other.

17. Qu. If one who is under the age of 30. yeeres, and brought up in husbandry, or a mayd-ſervant, or brought up in any of the Arts or trades mentioned in the Statute of 5. *Elizab. c.4.* and not enabled according to that Statute, to live at his or her owne hand, ſhall be warned by two Iuſtices of the Peace to put him or her ſelfe in ſervice by a day preſcribed by them, and ſhall not doe the ſame accordingly, but ſhall after continue living at his or her owne hand, what courſe ſhall bee taken with ſuch a perſon, and how puniſhed?

Reſol. Such perſons being out of ſervice, and not having viſible meanes of their owne, to maintaine themſelves without their labour, and refuſing to ſerve as an hyred ſervant, by the yeere, may be bound over to the next Seſſions or Aſſizes, and to bee of the good behaviour in the meane time, or may be ſent to the houſe of correction.

18. Qu.

18. Qu. Whether the taxe for the reliefe of the poore, upon the Statute of 43. *Elizabeth*, ſhall bee made by ability or occupation of lands, or both, and whether the viſible ability in the pariſh where hee lives, or generall ability whereſoever, and whether his rent received, within the pariſh where hee lives ſhall bee accompted viſible ability, and whether hee ſhall bee taxed of them onely and for any Rents received from other Pariſhioners; and what ſhall bee ſayd viſible ability?

Reſol. The Land within each pariſh is to be taxed to the charges in the firſt place equally and indifferently, but there may bee an addition for the perſonall viſible ability of the pariſhioner within that pariſh according to good diſcretion, wherein if there bee any miſtaking, the Seſſions, &c, or the Iuſtice muſt judge betweene them.

19. Qu. Whether ſhops, ſalt-pits, ſheds, profits of a Market, &c. be taxable to the poore as well as lands, Cole-mynes, &c. expreſſed in the Statute 43. *Elizabeth*?

Reſol. All things which are reall, and a yeerely revenue, muſt be taxed to the poore.

20. Qu. Whether the taxe for the County ſtocke, Gaole, and houſe of Correction is to bee made by the Statute of 14. *Elizabeth*, *cap.* 43. *Elizabeth*: by ability, and upon the Inhabitants of the pariſh onely, or upon

them, or the occupiers of Lands, dwelling in that pariſh: or whether ſuch as occupie lands in that pariſh, and dwell in another pariſh ſhall bee taxed?

Reſol. If the Statute in particular caſes give no ſpeciall direction, it is good diſcretion to go according to the rate of taxation for the poore: but when the Statutes themſelves give directions, follow that.

21. Q. Whether any taxes ought to be made for the charges that petty Conſtables and Borſhoulders are at in conveying rogues from pariſh to pariſh, and relieving of them, and how to be rated?

Reſol. It is fit to relieve the Conſtable and Tything men, in ſuch ſort as it hath beene uſed in the ſeverall places where they live.

22. Qu. Whether a Iuſtice of Peace may diſcharge a ſervant being with childe from her ſervice, allowing that as a reaſonable cauſe that ſhe is thereby made unable to doe the ſervice which otherwiſe ſhe might have done, and if hee may diſcharge her, whether that Pariſh ſhall provide for her, till her delivery, if ſhee cannot provide for her ſelfe; and ſo alſo if her time be expired before her delivery, who ſhall provide for her after her time ended?

Reſol. If a woman being with childe procure̅ her ſelfe to bee retayned with a Maſter who knoweth nothing thereof, is a good cauſe to diſcharge her from his ſervice. And if ſhee bee be-

begotten with childe during her ſervice, it is al one, but the Maſter in neither caſe muſt turne away ſuch a ſervant of his owne authority. But if her terme be ended, or ſhee lawfully diſcharged; the Maſter is not bound to provide for her, but it is a misfortune falne upon the pariſh, which they muſt beare, as in other caſes of caſuall impotency.

23. Qu. Whether being delivered of a baſtard childe in one pariſh, and goeth into another with her child; and becomes vagrant, and ſo is ſent to the place of her birth: her baſtard childe being under the age of ſeven yeeres, ſhall be ſetled with the mother, and there maintained if the mother bee not able, nor the reputed Father knowne, found: or whether it ſhall be ſent to the place of its birth, or being ſetled with the mother, whether the Pariſh where it was borne, ſhall be ordered by the two next Iuſtices to pay a weekely ſumme towards the mainetenance of it?

Reſol. The Baſtard child muſt be placed with the mother, ſo long as it is within the quality or condition of a Nurſe childe, which ſhall be, till ſeven yeeres of age; and then it is fit to be ſent to the place of its birth to be provided for, the mother or reputed father, not being able. And the Pariſh where the childe is borne ſhall not be forced to contribute to the charge, as long as the Mother lives, and the child be under ſeven yeere old.

24. Qu. A man with his wife and children takes an house in one parish, for a yeere: and before the end of his terme is unlawfully put out of possession, and after taketh part of an house, as an Inmate in another parish, from whence hee is also put out, and then not being able to get any dwelling, they come to lye in a Barne in a third parish where the husband falleth sicke, and the Wife is delivered of another childe, where ought these to be setled?

Resol. If a man or woman having house or habitation in one parish bee thrust out, this is an illegall unsetling which the Law forbiddeth, for none must bee enforced to turne vagrant, and such one must bee returned to the place where hee or shee was last lawfully setled, and the Childe also borne in the time of this distraction.

25. Qu. Whether an apprentice put out by the Churchwardens, &c. according to the Statute to a Master in another parish, if his Master dye and leave no Executor or Administrator fit to keepe an apprentice or able to place him: Hee shall bee provided for in the parish where hee was apprentice or shall bee sent backe to the parish from whence heo was put out?

Resol. Servants and apprentizes are by law setled in that parish, and if they become impotent there, the parish must abide the adventure,

turē after their terme or time of ſervice be lawfully ended.

26. Qu. What is accompted a lawfull ſetling in a pariſh, and what not?

Reſol. This is too generall a queſtion to receive a perfect anſwer to every particular caſe which may happen: but generally this is to be obſerved, that the law unſetleth none who are lawfully ſetled; nor, permits it to bee done by practice, or compulſion, and every one who is ſetled is a native houſholder, ſojourner, an apprentice or ſervant for a month at the leaſt, without a juſt complaint made to remove him or her, ſhall be held to be ſetled.

27. Qu. A rogue is taken at C. and will not confeſſe the place of his birth: neyther doth it appeare otherwiſe but that he confeſſeth the laſt place of his habitation to be at S. hereupon he is whipped and ſent to S. at his comming to S. the place of his birth is there knowne by ſome to be at W. and thereupon the rogue confeſſeth it to be ſo: whether hee might without any new vagrancy be ſent to W?

Reſol. In this caſe it is fit to ſend ſuch a rogue to the place of his birth: for this is but a miſtaking and no legall ſetling.

28. Qu. If an Indictment be preferred to the grand Iury of the quarter Seſſions of the peace againſt one for murther, manſlaughter, for robery, felony, or Petilarceny, and ignoramus found thereupon, whether the ſaid Seſſions may deliver the party by Proclamation or not? *Reſol.*

Reſol. Not by Proclamation at all, but for petty Lacenyes, and other petty Fellonies; in diſcretion the Goale may bee delivered of them.

29. Qu. If a Conſtable be choſen and refuſeth to take his Oath, what ſhall bee done, and whether a Conſtable may make a deputy, and by what meanes?

Reſol. The refuſall or neglect to take oath in ſuch a caſe is a contempt worthy of puniſhment, and thereupon to fine, and impriſon him, and the making of a deputy is rather by toleration, then by law.

30. Qu. If a Conſtable dyē or remoove out of the Pariſh where, &c. how is his place to be ſupplyed?

Reſol. By the Lord of the Leete, if that time fall neere, otherwiſe by the Seſsions; but if that bee too farre off, then by the next Iuſtices.

31. Qu. If a poorē weake man bē choſen Conſtable or Tythingman, and be unfit for the place how may he be remooved, and a fit man ſworne in his roome?

Reſol. The Iuſtices of Peace muſt helpe this, and if the Lord of the Leete have power to chooſe a Conſtable or Tything-man and performe ſo ill, it is a juſt cauſe to ſeize his liberty.

32. Qu. If a Nurſe-childe, a Scholler at a Grammar-ſchoole, or in the Vniverſity proove

to

to be impotent by Sickneſſe, lameneſſe, lunacy, or diſcovery of Ideocy, &c. how ſuch perſons ſhall be diſpoſed?

Reſol. A Nurſe-child, or a Scholler at the Grammar-ſchoole, or at the Vniverſity, or perſons ſent to the Common gaole, Hoſpitall, or houſes of Correction, are not to be eſteemed as perſons to be ſetled there, more then Travailers in their Innes, but their ſetling is where their Parents are ſetled; and Children borne in common Gaoles, and Houſes of correction, their parents being priſoners, are to be maintained at the charge of the County.

33. Qu. What proportion Parſonages, or Tithes ſhall beare to the taxation of the poore of the Pariſh?

Reſol. The Parſon or Vicar preſentative, ſhall according to the reaſonable value of his Parſonage, having conſideration to the juſt deductions.

34. Qu. Whether for placing the poore of the pariſh, not to be removed by conſent of the pariſh, theſe poore men may not bee placed as Inmates for a time?

Reſol. They may by expreſſe words of the Statute of the 43. of *Elizabeth*.

35. Qu. If a pariſhioner or owner within a pariſh do bring into the pariſh without the conſent of the pariſh, a ſtranger of another pariſh, which is, or apparantly is like to bee burthenſome unto the pariſh, how they may eaſe themſelves?

Reſol. By taxing ſuch a one to the charge of the rates of the poore, not onely having reſpect to his ability or the land he occupies, but according to the dammage and danger he bringeth to the pariſh by his folly.

36. Qu. For warding in the day-time, for apprehending of Rogues, whether the Conſtable may not enlarge it to a farther time?

Reſol. Warding in the day-time is of great uſe, and muſt bee left to the diſcretion of the Conſtables or direction of the Iuſtices to vary according to the occaſion.

37. Qu. Whether Alehouſes ought to be allowed only in thorow-fare Townes, and others in other places to be reſtrained onely to ſell to the poore out of doores.

Reſol. The Iuſtices ſhall doe very well to allow none but in places very fit for their ſcituation and uſes, and to moderate the number.

38. Qu. A man for his quality otherwiſe fit to be a Conſtable, or of other Office of that nature, procures himſelfe to be the Kings ſervant extraordinary, and by that meanes would excuſe himſelfe to ſerve in the Country?

Reſol. A ſervant extraordinary may well performe his ordinary ſervice in the Country according to his quality.

The

The Iuſtices opinion touching the Commiſsions by which the Iuſtices ſit at Newgate.

THE Iuſtices at Newgate ſit by vertue of two Commiſſions (*viz.*) Gaole delivery, and Oyer and determiner.

By the Commiſsion of Gaole delivery they may try all priſoners in the Gaole or by Bayle, or ſuch as be indicted will render themſelves, generally for all Felonies: and alſo for ſuch other offences as are particularly aſſigned to them by Statute.

Anciently felonies included all treſpaſſes, therefore the iuſtices of Gaole delivery have power to hold plea of treſpaſſes againſt them in priſon or upon bayle to render themſelves.

The Statute of 4 *Elizabeth*, 3 *cap.* 2. doth give them power to receive Indictments againſt Priſoners or ſuch as are upon bayle, and to proceede to try the ſame (*viz.*) Indictments taken before the Iuſtices of the peace, and by equity thereof all Indictments before coroners, 3. *Mar. Bro. Commiſsion. omnium.* 24. ſaith, That the Commiſsion is *ad deliberand. Gaol. de priſon. in eiſdem exiſten.* But they cannot take Indictments as Iuſtices of Gaole delivery, but being Iuſtices of the peace, they may take Indictments againſt priſoners, but not againſt them that bee at large, for aſmuch as power

v. 1. *Mar. Dyer* 99. Iuſtices of Gaole delivery hold pleas of all appeales of felony or murder againſt one in priſon by their general Com. and of appeales: ſo by the ſame reaſon to take Indictments.

is given them, consequently they must have meanes to doe so, which is by Indictments, *Id quærend.*

Howsoever it is cleere, that they may enquire of many offences and take Indictments in such cases where power by the Statute is given to the Iustices of Gaole delivery, in such cases where they have authority by Law or Statute there the title of Indictments is, that *Ad gaolam deliberationem tent.* before the Commissioners of Gaole delivery, *I.S.* was indicted, and the record must be made up so.

And whereas by the Statute of 4. *Eliza.* 3 *cap.* 2. Indictments taken before Iustices of peace or Coroners, or any other against any Prisoners, then the entry of the Indictments is returned taken, *Memorand. quod ad generalem Sessionem tent.* before *A.B.C.* Iustices *ad pacem in Com. Middlesex* or *London*, *I.S.* was indicted, and then tryed before Iustices of Gaole delivery, and by vertue of the said Statute, Indictments taken before Iustices of the Peace of *London* or *Middlesex*, are tryed before the Iustices of Gaole delivery.

The Commissioners of Oyer and Terminer is *Ad triand. inquirend. audiend. & determinand.* They may enquire of all offences mentioned in the Commission, albeit the offendors bee at large, but they cannot try prisoners upon Indictments taken before any other then themselves, as the Iustices of Gaole delivery may by the

the aforesayd Statute, unlesse there bee a speciall Commission made, as it was in the case of the Earle of *Leicester*, mentioned in *Plow. Com.* for the ordinary Commission of Oyer, and terminer is *ad inquirend. audiend. & determinand.* therefore they cannot determine of things unlesse they made enquiry first, and on the other side also the Iustices of Gaole delivery may try Indictments taken before Iustices of the peace, yet if one indicted before Commissioners of Oyer and Terminer, the Iustices of Gaole delivery cannot try the same, because the Record of the Commission of Oyer and Terminer are to be returned in the Kings Bench, 44. E. 3. 31. 3. Mar. Bro. Com. 24.

The Commission and the Records of the proceedings before the Iustices of Gaole delivery, are to be returned to the Custos Rotulor. of the County, when the same persons are Iustices of Gaole delivery, and of Oyer and Terminer, they may sit the same day and place, and enquire by the same Iurie, but the entry of the Records must be severall, according as the Indictment is.

At the Assises in the Countrey, the Iustices have their severall power as the Iustices of Gaole delivery, Oyer and Terminer, and Iustices of peace.

But when the Records are made up, they must be according to the power they made election to proceed upon.

This is the regular and legall course. But the Clerkes of the Assizes promiscuously make entry thereof, But if a Writ of Errour bee brought, they must certifie according to Law, or else it will be erronious, and so upon a *Certiorari*.

The Sessions of *London* may bee begun at the Guild-hall, and then adjourned to Newgate, If some Indictments bee at Guild-hall, then those must bee so certified: if others at Newgate; then the adjournment must bee mentioned, and that the Indictment was then taken.

Note that the tryall of Indictments taken before Iustices of the peace of *London*, cannot be tryed at Newgate, as in nature of a tryall before Iustices of the peace at *London*, for many of the Commissioners, for Gaole delivery, are not Iustices of the peace for London, but in such cases the tryall must be before the Iustices of Gaole delivery: as upon Indictments taken before the Iustices of the peace of London; as in the case of Indictments taken before the Iustices of the peace of Middlesex.

But if Indictments at Newgate be originally taken before them, as Iustices of Gaole delivery, then it is inquirable how the Iury sworne, and impannelled to enquire at the Sessions of the Peace for London, or Middlesex, doe serve to present Indictments before the

the Iuſtices of Gaole delivery at Newgatē, unleſſe the cuſtome and uſage will warrant, the two ſeverall Iuries, ſworne at the Seſſions of the peace for *London* or *Middleſex*, are alſo by the ſame oath and impannelling to ſerve for the grand Iury for the Commiſſion of Gaole delivery, and Oyer, and Terminer.

Vpon conference with Mr. *Keeling*, and the Clerkes for Newgate of *London*, and *Middleſex*, and the Clerkes of Aſſizes, and view of the ſeverall Entries, a more mature and certaine reſolution may bēe given, this being in haſtē, and without ſuch conſiderations as were requiſite.

FINIS.